

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
WONG SING.

} No. 44.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.*

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The defendant in error was indicted in the United States District Court for the District of Utah in two counts (pp. 1-3). Only the second count is material on this writ of error. That count (pp. 2, 3) alleged that the defendant knowingly and unlawfully purchased, from a person or persons unknown, morphine and cocaine, the said drugs so purchased not being then and there in the original stamped packages, "or from the original stamped packages," in violation of section 1 of the act of December 17, 1914, c. 1, 38 Stat. 785, Comp. Stats. section 6287g, as amended by section 1006 of the General

Internal Revenue Law of February 24, 1919, c. 18,
40 Stat. 1130.

The district court sustained a demurrer to the indictment (p. 4) and certified (pp. 6, 7) that such action was taken solely by reason of the construction placed by the court on the words "any person" in that portion of section 1006 of the act of February 24, 1919, supra, on which the second count of the indictment was based, viz, that said words "any person" were limited to those persons, being importers, producers, dealers, or physicians who, by the terms of the original act of December 17, 1914, c. 1, supra, substantially reenacted by the prior portion of section 1006 of the act of February 24, 1919, c. 18, were required to register and pay a special tax, this construction (it was claimed) being justified by the decision of this court in *United States v. Jin Fuey Moy*, 241 U. S. 394. Accordingly, since the second count of the indictment contained no allegation that the defendant was a person required to register and pay a special tax, the demurrer to said count was sustained.

To the judgment sustaining the demurrer this writ of error was sued out under the authority of paragraph 2 of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, Comp. Stat., section 1704.

THE RELEVANT STATUTES.

Section 1006 of the General Revenue Act of February 24, 1919, c. 18, 40 Stat. 1140:¹

SEC. 1006. That section 1 of the Act of Congress approved December 17, 1914, is hereby amended to read as follows:

“SECTION 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district, his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes herein-after provided;

“Every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

“Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

“Importers, manufacturers, producers, or compounders, \$24 per annum; wholesale

¹ The italicized portion is that upon which the second count in the indictment in the present case was based, and was new legislation, entirely additional to the provisions of section 1 of the Harrison Narcotic Act of December 17, 1914, c. 1.

dealers, \$12 per annum; retail dealers, \$6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance shall pay \$3 per annum.

"Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer or producer.

"Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

"Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided further*, That officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter pre-

scribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

"It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

"That the word 'person' as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

"That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

"The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: Provided, That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional

practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this act of the drugs so dispensed, administered, distributed, or given away.

“And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

“That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

“Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

“The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect.”

Portions of section 2 of the Harrison Narcotic Act of December 17, 1914, c. 1:²

That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a phy-

² The italicized portion is that involved in *Doremus v. United States*, 249 U. S. 86, and the first certified question in *Webb v. United States*, 249 U. S. 94.

sician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

Section 8 of the Harrison Narcotic Act of December 17, 1914:³

Sec. 8. That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: *Provided*, That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, district, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: *Provided further*, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under

³ This was the section involved in the case of *United States v. Jin Fuey Moy*, 241 U. S. 394.

this Act; and the burden of proof of any such exemption shall be upon the defendant.

The assignment of errors raises the question herein-after discussed (p. 5).

ARGUMENT.

The question here involved is a narrow one of statutory construction and requires no extended discussion. It involves merely the effect upon the Harrison Narcotic Act of the amendment made by section 1006 of the internal revenue law of February 24, 1919, c. 18 (40 Stat. 1130), considered in the light of the decisions of this court in the *Doremus* and *Webb* cases, *infra*. The law, with the amendment indicated, has been set forth, *supra*.

The original Harrison Narcotic Act of December 17, 1914, provided in section 1 that all persons importing, producing, or dealing in drugs should register and pay a special tax. That it should be unlawful for any person required to register to produce, import, manufacture, etc., the drugs without having registered and paid the tax. Section 2 provided that it should be unlawful for any person to sell, etc., the drugs except in pursuance of a written order on a form to be issued by the Commissioner of Internal Revenue, but excepted from this provision the dispensing or distribution of the drugs by druggists and physicians under certain circumstances. Section 8 then provided that it should be unlawful for

any person *not registered under the act* to have the drugs in his possession or control.

In the case of *United States v. Jin Fuey Moy*, 241 U. S. 394, this court held, in construing section 8 of the act of December 17, 1914, that the words "any person not registered" in the section can not be taken to mean any person in the United States, but must be taken to refer to persons of the class with which the statute undertakes to deal, that is, the persons who are required to register by section 1. This conclusion was based upon the consideration that a construction of the words "any person" which extended their meaning beyond the classes thus limited would make the constitutionality of the statute doubtful. That decision, however, clearly applied only to the case then before the court, namely, the application of that portion of the original act, section 8, which punished the mere possession or control of the drugs.

Thereafter this court had before it the cases of *Doremus v. United States*, 249 U. S. 86, and *Webb v. United States*, 249 U. S. 96, which were argued and decided together.

In the *Doremus* case a demurrer to an indictment for violation of section 2 of the Harrison Act had been sustained upon the ground that the act was not a revenue measure, but was an invasion of the police power of the States.

This court reversed the judgment below and held the act to be a revenue measure and constitutional.

After referring to its decision in the *Jin Fuey Moy* case, 241 U. S. 394, the court said:

The provisions of § 2 to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers, and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

In the *Webb* case, Webb and another had been convicted, under section 37 of the Criminal Code, for a conspiracy to violate section 2 of the Harrison

Act. The Circuit Court of Appeals certified to this court three questions, the first and second being:

1. Does the first sentence of § 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor, and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

The Court in answering the questions said (p. 99):

What we have said to the construction and purpose of the act in No. 367 (The *Doremus* case) plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367.

So in the *Doremus* case it was held that the provisions of section 2 aimed to confine sales to registered dealers, to those dispensing the drugs as physicians, and to those who came to dealers with legitimate prescriptions; that those provisions tended to keep the traffic aboveboard and subject to inspection by the revenue officers, and tended to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax; while the *Webb* case affirmed the constitutionality of the act when construed to apply to others than those required to register under its terms.

It is therefore settled, that the prohibitions of the act with respect to *trafficking* in narcotics, as distinguished from the mere possession, apply to all persons, and not merely to those required to register.

These two decisions free the present case from the difficulty which caused the court below to sustain the demurrer to the indictment on the authority of the Jin Fuey Moy case. When the amendment of Feb. 24, 1919, is examined in the light of these cases, the meaning and application of the entire act as amended becomes clear.

The principal part of this amendment and its vital feature as a change in the previous law is that a tax was laid directly upon opium, cocoa leaves, and their derivatives in addition to the tax upon the dealers, and provided that the payment of this tax should be evidenced by stamps to be affixed to the container so as to seal it securely.

As amended, therefore, the act defines wholesale dealers as those who dealt *in* the original stamped packages and retail dealers as those who deal *from* the original stamped packages. It then provides that it shall be unlawful for any person to purchase or sell these drugs except *in* or *from* the original stamped packages. This plainly is a general provision and necessarily applies to any one dealing in them. This is borne out by the proviso which excepts persons who obtain the drugs from the registered dealer pursuant to a prescription, or as a patient.

Since the *Webb* case held that the prohibition against purchasing from a druggist extended to a person who had no prescription or order blank, and could not obtain one because not of the class to which blank might be issued, it is plain that the prohibition against *traffic* as distinguished from *mere possession* (the *Jin Fuey Moy* case) is absolute except in the cases specifically exempted from the provisions of the act.

The only persons who could be expected to deal in the drugs in violation of the prohibition would be those persons who are not entitled to register and pay the tax and consequently could not legitimately deal in such packages. As the court pointed out in the *Doremus* case, a drug addict himself might not necessarily use the great number of doses mentioned in the indictment. He might sell some to others without paying the tax, and Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue. If the act is valid under the taxing clause of the Constitution as imposing a tax upon narcotic drugs and those who deal in them, and if Congress has the right to require all legitimate dealers to register and pay a tax and furthermore to provide that the payment of the tax upon the drugs themselves shall be evidenced by stamps placed upon the container, then surely it has power to make it a crime to traffic in these drugs *in* or *from* unstamped packages.

Thus we find in the act as it now stands a clear and comprehensive scheme for deriving revenue from the traffic in narcotic drugs. Those who deal in them must register and pay a tax, and all those not thus registered are forbidden to deal in them under severe penalties. The drugs themselves are taxed; stamps showing the payment of the tax must be affixed to the package in which they are sold, and the sale of them in unstamped packages is forbidden; and finally, every person, whether registered or not, who knowingly keeps or sells them *in or from* unstamped packages is guilty of a crime.

If Congress has power to prohibit the traffic by unauthorized persons, it surely has the power to extend the prohibition to traffic in unstamped packages, and that is the offense with which the defendant in error is charged.

The law is not dissimilar to the various internal-revenue statutes relating to the traffic in liquors and tobacco.

We suppose there is no question of the power of Congress to levy an internal-revenue tax upon opium and cocoa and their derivations, as upon liquors, beer, tobacco, snuff, etc. These and many other commodities have been subjected to a stamp tax.

Without referring in detail to the numerous statutes, it is sufficient to say that it is no new thing in internal-revenue legislation to require commodities to be sold in stamped packages and to make the

purchase or sale of them in any other way a criminal offense. It seems unnecessary to argue that the purchase and sale of narcotics in or from unstamped packages tends directly to deprive the United States of the revenue which it has the right to derive from the sale of the stamps, and, therefore, a law making it criminal to do so is appropriate and plainly adopted to accomplish a purpose clearly within the power of Congress.

McCulloch v. Maryland, 4 Wheat. 423.

CONCLUSION.

The judgment of the Court below should, therefore, be reversed.

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ALFRED A. WHEAT,

Special Assistant to the Attorney General.

OCTOBER, 1922.

